A **SAROJA MN MUTHUPALLANIAPPA**

v.

MUTHURAMAN M KARUPPIAH & ORS

B HIGH COURT MALAYA, TAIPING
ZAKARIA SAM J
[CIVIL SUIT NO: 22-41-1999]
23 SEPTEMBER 2011

C ***LAND LAW:*** *Indefeasibility of title and interest - Transfer - Plaintiff registered as proprietor or co-proprietor of lands - Whether properties given as gift - Whether presumption of advancement rebutted*

LAND LAW: *Transfer - Gift - Plaintiff registered as proprietor or* D *co-proprietor of lands - Whether properties given as gift - Whether presumption of advancement rebutted*

LAND LAW: *Transfer - Validity of - Whether land transferred to deceive public administration of country - Whether court used to facilitate act of deception*

E

Sometime in December 1974 and January 1975, the deceased transferred all the pieces of land described in the First Schedule of the statement of claim and the plaintiff had been registered as the proprietor or co-proprietor of the said lands. The deceased F died on 19 April 1994 leaving a will dated 27 November 1991. Subsequently, a Deed of Family Arrangement dated 12 May 1994 ('the Deed') was executed by the plaintiff, the second defendant, the late third defendant and the late fourth defendant, all of whom were the children of the deceased. Separate Letters of G Undertaking dated 25 May 1994 were executed between the second defendant and the plaintiff and the plaintiff with the fourth defendant pursuant to which the said lands and the lands in the name of the fourth defendant ('the properties') were to be divided equally between all of the deceased's children. It was the plaintiff's H case that she was the registered proprietor or co-proprietor of the properties and hence invoked the presumption of advancement to say that the properties were a gift to her by the deceased. She stated that she was coerced to sign the Deed and the Letter of Undertaking by the third defendant. She also contended that the I Deed was void for want of consideration and was against public policy as it had allegedly re-written the terms of the will. Whereas the defendants were contending that the plaintiff held the

properties on a resulting trust for the estate of the deceased. The defendants submitted that the deceased transferred the properties to the plaintiff to reduce the acreage under his name to less than 100 acres, so as to comply with the legal requirements to claim cess payments. The deceased had never intended to devise the properties absolutely to the children and hence, it was the defendants' case that the deceased transferred the properties to the plaintiff to commit a deception on the public administration of the country.

Held (allowing plaintiff's claim with costs and dismissing the defendants' counter claim with costs):

(1) The first and second defendants' argument that it was the plaintiff who relied on illegality was misconceived as the issue of illegality only arose upon the attempt by the defendants to rebut the presumption of advancement by mounting on resulting trust. (para 33)

(2) The Deed and the Letter of Undertaking introduced by the defendants were attempts to rectify the deceitful act of the deceased *ie*, to enjoy the benefit of financial aid from the government and at the same time retaining the right over the said lands to have them distributed equally between his children upon his death. Although the *deceit* was committed by the deceased, the defendants' act here was to get the assistance of the court to give effect to the wish of the deceased. The court should not facilitate the defendants' claims any further. (paras 38-41 & 43-45)

(3) The plaintiff was the duly registered proprietor or co-proprietor of the properties and the defendants had failed to establish a resulting trust in favour of the estate of the deceased to rebut the presumption of advancement in favour of the plaintiff. (para 46)

(4) The Deed was strictly an agreement between the four siblings to divide equally the properties as stated therein and was executed to replace the will of the deceased. Further, the first and second defendants as executors and trustees of the will never sought the approval of the court for the Deed. The Deed also did not specifically release the executors and trustees from their obligations as trustees of the will. Hence, based on the evidence, the status or validity of the Deed was doubtful. (paras 51-54, 56-61, 63 & 64)

(5) The plaintiff's argument that there was material non-disclosure was well founded as the plaintiff did not have the information which she needed, to come to a considered decision on the Deed. The Deed also constituted a wrongful advantage taken by the defendants over the plaintiff as the defendants had exercised undue influence on the plaintiff. (paras 70 & 80)

(6) The Letter of Undertaking was prepared by solicitors for the first and second defendants but was not signed before any solicitors and the plaintiff did not have the benefit of an independent legal advice. It referred only to a portion of the titles in the name of the plaintiff. The fact that the plaintiff did not execute any transfer form to effect the transfer and had not done everything that was necessary to effect the transfer rendered the gift an imperfect gift. (paras 85, 86 & 89)

Case(s) referred to:

Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 CA ***(foll)***

Hj Mohamed Idris v. Grenier [1939] 1 LNS 31 HC ***(refd)***

In re Snelling, Snelling v. Hanna [1930] NZLR 426 ***(dist)***

Kondapuram Raghuram v. Soo Peng & Ors [2006] 5 CLJ 634 HC ***(refd)***

Macedo v. Beatrice Stroud [1922] 2 AC 330 ***(refd)***

Morley v. Loughnan [1893] 1 Ch 736 ***(refd)***

National Westminster Bank v. Morgan [1985] AC 686 ***(refd)***

New Zealand Netherlands Society "Oranje" Inc v. Kuys [1973] 2 NZLR 163 ***(refd)***

Norman Disney & Young v. Affifi Hj Hassan [2011] 1 CLJ 210 HC ***(refd)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(foll)***

Pek Nam Kee v. Peh Lam Kong [1996] 1 SLR 75 ***(refd)***

Re Estate of Chong Siew Kum, deceased [2005] 2 SLR 324 ***(foll)***

Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow and Ors [1951] 1 LNS 77 HC ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***

Tinsley v. Miligan [1994] 1 AC 340 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 16, 24(e)

Other source(s) referred to:

Halsbury's Laws of England, vol 48 (Butterworth, 4th edn, Reissue, 2000) para 614

For the plaintiff - Manian Raju (Krishnan Dallumah with him); M/s Krishna Dallumah, Manian & Indran
For the 1st & 2nd defendants - V Vijaya Segaran (Hemalatha Pavasa Ramalu with him); M/s Maxwell Kenion Cowdy & Jones
For the 3rd & 4th defendants - A Param (AA Albert with him); M/s Albert & Co

Reported by S Barathi

JUDGMENT

Zakaria Sam J:

Background

[1] The 1st defendant is the grandson of M.N. Muthupalaniappa Chettiar s/o Nallan Chettiar (the deceased) and the son of the 2nd defendant.

[2] The plaintiff, the 2nd defendant, the both late 3rd and 4th defendants are the children of the deceased.

[3] The 3rd defendant who passed away during the trial was substituted by his wife, Saraswathi Achi, the Executrix of his Estate.

[4] The 4th defendant who also passed away in the course of the trial was substituted by his son Subramaniam a/l Ramanathan, the Executor of his Estate.

[5] The 1st and 2nd defendants are also the Executors and Trustees of the Will of the Estate of the deceased who died on 19 April 1994.

[6] Sometime in December 1974 and January 1975, the deceased transferred all those pieces of land described in the First Schedule of the statement of claim and the plaintiff has been registered as the proprietor or co-proprietor in respect of the said lands (at pp. 19 to 20 of Bundle A) (the 'said lands').

[7] The deceased died on 19 April 1994 leaving a Will dated 27 November 1991 (at pp. 71 to 71 of Bundle E) appointing the 1st and 2nd defendants as Executors.

[8] The beneficiaries under the said Will may be visualized in a diagram as follows (by the courtesy of counsel for the 1st and 2nd defendant):

M.N. Muthupalaniappa Chettiar s/o Nallan Chettiar (the deceased)

Nallapan @ Sundaram a/l Muthupalaniappa Chettiar (original 3rd defendant)	M. Ramanathan a/l Muthupalaniappa Chettiar (original 4th defendant)	Kannamai @ Sundari a/p Muthupalaniappa Chettiar (2nd defendant - SD1)	Saroja d/o M.N. Muthu Palaniappa (plaintiff - SP1)
Children	**Children**		
1. Muthupalaniappa @ Nagarajan a/l Nallapan	1. Chinthamani a/p Ramanathan		
2. Raaja Sundaram @ Malayandi a/l Nallapan (SD5)	2. Muthupalaniappa a/l Ramanathan (SD6)		
	3. Alamelu a/p Ramanathan (SD10)		
	4. Kalyani a/p Ramanathan (SD9)		
	5. Subramaniam a/l Ramanathan (SD11)		

[9] A Deed of family arrangement dated 12 May 1994 (also known as the Tamil Agreement – exh. D1) (after this the 'said Deed') was executed by the plaintiff, the 2nd defendant, the late 3rd and 4th defendants on 23 May 1994. The late 3rd and 4th defendants executed the same in their own capacities as well as on behalf of their children who were beneficiaries under the Will.

[10] Separate letters of undertaking dated 25 May 1994 (exh. D3) were executed between the 2nd defendant and the plaintiff and the plaintiff with the late 4th defendant (exh. D2) pursuant to which the said lands and the lands in the name of the late 4th defendant namely CT No. 26594 Lot No. 813, Mukim Kamunting and Lot No. 1878, Mukim Kamunting (hereafter collectively referred to as the "said properties") were to be divided equally between all of the deceased's children namely the plaintiff, the 2nd defendant, the late 3rd and 4th defendants.

[11] The deceased was the holder of four Powers of Attorney from all four of his children – see pp. 66 to 69, 62 to 65, 12 to 15, 16 to 19 of bundle E.

[12] The 1st and 2nd defendants also prepared a declaration of trust (exh. D10) for the execution of the plaintiff together with a covering letter (exh. D4) in pursuance of the said Deed but this was not executed or returned by the plaintiff. The 1st and 2nd defendants also prepared a similar declaration of trust for the execution of the late 4th defendant (exh. D11) but he too did not sign or return the document.

[13] In view of the plaintiff, the 2nd defendant, the late 3rd and 4th defendants executed the said Deed and the plaintiff and the late 4th defendant having executed the letters of undertaking (exhs. D3 and D2 respectively) the 1st and 2nd defendant as executors had extracted the Grant of Probate *vide* Taiping High Court Petition No. 32-18-1994 (pp. 78 to 84 of bundle E) on 4 May 1999 but distributed those properties that were in the list of assets to the said grant of probate only.

The Plaintiff's Claim

[14] The plaintiff claims *inter alia* that:

i. The said lands which were transferred to her were meant for her only. She further claims that she was coerced to sign the said Deed (exh. D1) and the letter of undertaking (exh. D3) by the late 3rd defendant.

ii. The said Deed is void for want of consideration and that the said Deed is against public policy as it allegedly re-writes the terms of the Will and that the said Deed is unenforceable as the terms of the Will was rewritten without the consent of all the beneficiaries under the Will.

iii. The said Deed is *ex facie* bad in law as it is not an assignment of the plaintiff's rights (beneficial and registered) under her properties.

iv. The said Deed was executed under duress and under undue influence as she did not obtain independent legal advice in signing the same.

v. Clause 4 of the said Deed which reads: 'In Malaysia those who own property, in relation to this family properties there should not be any hindrance to sign and transfer them. Four of them have share in properties' is void for uncertainty.

A vi. In respect of the letter of undertaking dated 25 May 1994 it is unsupported by any consideration and that her signature was obtained under duress and threat.

vii. It is only after the plaintiff had obtained advice on the
B contents of declaration of trust, did she come to know for the first time of the extent of her properties which information was concealed by the 1st and 2nd defendants and or all parties to the suit and that she came to know of the contents of the 2nd recital of D10 were false and therefore refused to
C execute exh. D10 and informed the defendants that she intended to terminate the said Deed; and

viii. That the said Deed and the letter of undertaking should be set aside on the basis that they were executed under a situation where the plaintiff did not understand the effect of
D the said transactions primarily since the 1st and 2nd defendant had concealed the details of the plaintiff's properties from the plaintiff.

[15] The plaintiff admits in her pleadings that when the said lands
E were transferred and registered in her name, she was only 19 years old and she had not advanced any consideration whatsoever for receiving the said lands. She admits that the consideration for the said lands as stated in column 2 of Schedule 1 of the statement of claim was not in fact paid by her.

F

[16] The plaintiff also admits that although the said lands were registered in her name she neither administered the said lands nor did she spend any money towards the management of the said lands and these were in fact performed by the accused.

G

Defence

[17] It is the defendants' case that, between 1974 and 1975, the deceased has transferred the said lands to the plaintiff on trust for him. This is having regard to the facts that:

H

i. The plaintiff was a minor at the time and further did not pay for the lands. She also did not derive any benefit from the lands.

I ii. The deceased retained the title Deeds and controlled/managed the lands (the oil palm estates) and kept all income derived from them.

iii. The deceased held a Power of Attorney No. 147/1981 dated 30 January 1981 (pp. 66 to 69 of Bundle E) from the plaintiff over the said lands.

[18] It was the intention of the deceased to merely vest nominal legal ownership over the said lands in the plaintiff as he retained the beneficial ownership in the said lands.

[19] In fact the deceased was the holder of powers of attorney from all four of his children.

[20] The intent and purpose of entering into the said Deed was to divide the said property equally between the four children of the deceased and on further understanding that the said four children would distribute the same in turn to their children as they may deem fit, later.

[21] The issues herein are whether:

i. The said lands which were transferred to the plaintiff were meant for her only;

ii. The plaintiff was coerced to sign the said Deed and the letter of undertaking by the 3rd defendant;

iii. The said Deed is void for want of consideration;

iv. The said Deed is against public policy as it allegedly re-writes the terms of the Will;

v. The said Deed is unenforceable as the terms of the Will was rewritten without the consent of all the beneficiaries under the Will;

vi. The said Deed is *ex facie* bad in law as it is not an assignment of the plaintiff's right (beneficial and registered) under the properties;

vii. The said Deed was executed under duress and under undue influence as the plaintiff did not obtain independent legal advice in signing the same;

viii. Clause 4 of the said Deed is void for uncertainty; and

ix. The letter of undertaking is unsupported by any consideration and that the plaintiff's signature was obtained under duress and threat.

Findings

[22] I will divide my judgment into three parts ie,:

i. The issue of Presumption of Advancement vs Resulting Trust.

ii. Whether the said Deed is valid and enforceable.

iii. Whether the letters of undertaking dated 25 May 1994 are valid and enforceable.

The Presumption Of Advancement vs Resulting Trust

[23] The plaintiff is the registered proprietor or co-proprietor of the said properties. She is the youngest child and daughter of the deceased. The plaintiff invokes the presumption of advancement to say that the properties were a gift to her by her late father, the deceased.

[24] The other siblings (the 2nd, the original 3rd and 4th defendants) contend that she holds the properties on a resulting trust for the estate of the deceased.

[25] Andrew Ang JC in *Re Estate of Chong Siew Kum, deceased* [2005] 2 SLR 324 at p. 329 cited *Halsbury's Laws of England,* Vol. 48 (*Butterworth,* 4th edn, Reissue, 2000) at para 614:

> **Advancement or gift to a child.** Where a father or other person in *loco parentis* purchases property in the name of a child or transfers property into the name of a child, the transaction **does not create a resulting trust for the purchaser** or transferor, **but is an advancement or gift to the child,** unless there is evidence of a contrary intention at the time of the transaction or the circumstances are such as to raise a presumption against the advancement or gift. (emphasis added)

[26] I respectfully adopt the principles as enunciated above.

[27] The onus is on the defendants to rebut the presumption of advancement and establish a resulting trust in favour of the estate of the deceased.

[28] To negate the presumption of advancement, the 2nd defendant in her affidavit evidence (at para 11 of exh. D7) deposes that:

> All the properties of the said Deceased are self earned. The said Deceased was only a Permanent Resident of Malaysia and to benefit from cess payment paid out for replanting of the estates lands, he had caused properties to be transferred so as reduce the acreage under his name to less than 100 acres. The total area of the estates was about 150 acres and he had caused about 50 acres to be transferred to and registered in the name of the plaintiff so as to comply with the legal requirements to claim cess payments.

[29] The 3rd defendant in his witness statement, given by way of an affidavit (lampiran 60), deposes that:

> The deceased did all the transfers retransfer of the said properties solely for the reason of obtaining government agricultural subsidy for the planting rubber trees on the said land the deceased believed that all land above 100 acres, and owned by a non-citizen (deceased was a permanent resident of Malaysia) will not qualify for government agricultural subsidy. The deceased therefore 'sold' the land in whole/part shares to his children (the parties herein to this suit) so as to qualify for the said subsidy. The deceased did not ever intend to devise the said properties to us absolutely.

[30] To sum up, it is the defendants' case that the deceased transferred the properties to the plaintiff to commit a deception on the public administration of the country.

[31] The case of *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] 28 MLJ 143, a Privy Council case from Malaysia is almost on all fours with the instant case. I would like to take liberty to reproduce Lord Denning's judgment in extensor:

At p. 144 paras. B to H right:

> The father bought these 40 acres as long ago as 1934. He bought them at a public auction for $8,081.00. But he already owned 99 acres of rubber lands. So that if his two holding were added together his total holding would be 139 acres. This was undesirable from his point of view because of the Rubber Regulations (No. 17 of 1934). These regulations were passed so as to control the production of rubber. They drew a distinction between holdings of less than 100 acres and holdings of more than 100 acres. If a man held more than 100 acres, the permissible production was assessed by an Assessment Committee. If he held less than 100 acres, it was assessed by the local District officer. In order to avoid these regulations, the father decided to put the 40 acres into his son's name so that his rubber land was ostensibly held by two different persons neither

of whom held a holding exceeding 100 acres. 'I had no intention,' he said, 'of making a present to my son. The sole object was to avoid having to disclose that I held more than 100 acres of rubber land'.

Accordingly on 27th February, 1935 the father and son executed a memorandum of transfer whereby the father transferred the 40 acres to the son. In this memorandum, the father acknowledged that the son had paid him $7,000 for these 40 acres. But in fact, as the Judge found, the son paid nothing; and this was accepted before their Lordships. On the 8th March 1935, the transfer was duly registered in the Registrar of Titles and a certificate of title was in due course issued certifying that the son was the proprietor of the 40 acres. This certificate remained in the father's possession, and he paid all the costs of the transfer.

Ever since the transfer, the father has received all the income from the 40 acres and has paid all the wages and assessments. The son has received no part of the income and has paid none of the expenses.

At p. 145 paras. G to H (left):

Their Lordships read this as a distinct finding that the transfer by the father to the son was made for a fraudulent purpose, namely, to deceive the public administration of the country: and that this fraudulent purpose was achieved, in that the holdings were treated by the public authorities as a separate holdings each under 100 acres, so that the permissible production of each was assessed by the local District officer and not by the Assessment Committee. True it is that neither the father nor his manager said in terms that they achieved this result but it was their objectives and it may reasonably be inferred that they achieved it. At any rate the trial Judge inferred it. 'The plaintiff', he said, 'has practised a *deceit* on the public administration.'

At p. 145 paras. D to G (right):

But in the present case, the plaintiff had of necessity to disclose his own illegality to the Court and for this reason: He had not only to get over the fact that the transfer stated that the son paid $7,000 for the land. He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard*

v. Cartwright at page 445. The fact that the father received the income does not suffice, see *Commissioner of Stamp Duties v. Byrnes*. The father has also to get over this pertinent question: If he intended the son to take as a trustee, why did he not insert on the memorandum of transfer the words 'as trustee' and register the trusts as he could have done under section 160 of the Land Code?

At p. 146 paras. A to C (left):

But where the fraudulent purpose has actually been effected by means of the colourable transfer, there is no room for repentance. The father has used the transfer to achieve his deceitful end and cannot go back on it. He cannot use the process of the Courts to get the best of both worlds – to achieve his fraudulent purpose and also to get his property back. The courts will say: "Let the estate lie where it falls" see *Sajan Singh v. Sardara Ali* and *Kiriri Cotton Co. Ltd v. Dewani* at pages 202-203.

At p. 146 paras. F to G (left):

But in the present case, the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield, 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'. See *Holman v. Johnson* at page 343. Their Lordships are of the opinion that the Courts should not lend their aid to the father to obtain a re-transfer from the son.

[32] The defendants' argument that it is their father's *deceit* and not the defendants', does not hold water. If there is no resulting trust in favour of the estate of the deceased, how could the defendants succeed against the plaintiff who has an indefeasible title to the lands under the National land Code?

[33] The first and second defendants' argument that it is the plaintiff who relies on illegality is also misconceived. The plaintiff is the registered owner of the properties in issue and she says that there is no resulting trust in favour of the estate of deceased because the lands are a gift from the deceased, her late father. The issue of illegality arises only upon the attempt by the defendants to rebut the presumption of advancement by mounting in a resulting trust.

[34] In a more recent case, *Tinsley v. Miligan* [1994] 1 AC 340, the House of Lords has dealt with similar issues. Lord Browne-Wilkinson at 372B says:

> Although the presumption of advancement does not directly arise for consideration in this case, it is important when considering the decided cases to understand its operation. On a transfer from a man to wife, children or others to whom he stands in *loco parentis*, equity presumes an intention to make a gift. Therefore in such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim, the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

[35] Gopal Sri Ram JCA (as he then was) in *Fusing Construction Sdn. Bhd v. Eon Finance Bhd & Ors And Another Appeal* [2000] 3 CLJ 341 at p. 352 states the principles lucidly as follows:

> Fusing does not have to rely upon its complicity in the illegal transaction to establish title. It is already the registered proprietor. It is asserting that registered proprietorship. That is why it is asking for vacant possession. Even if it has set out particulars of the illegal arrangement in its pleadings, it matters not a jot. Its claim is not founded upon the illegal arrangement.

[36] The same principle, *mutatis mutandis*, applies to the instant case.

[37] The intent and purpose of entering into the said Deed was to divide the said property equally between the four children of the deceased and on further understanding that the said four children would distribute the same in turn to their children as they may deem fit, later.

[38] Indeed, the learned counsel for the 1st and 2nd defendants, in his submission says:

> The totality of the above evidence supports the conclusion that at all material times, although the deceased transferred the said lands into the plaintiff's name, she only held the legal ownership of the said lands while the beneficial ownership continued to vest in the name of her father as the intention of the deceased was clearly to keep the said properties for himself and the plaintiff was aware of this intention and never questioned it.

[39] The former counsel for the 3rd defendant also in his submission says: A

> The purpose of the transfer (by the father) was to obtain aid from the government in the form of cess payments where small holdings of less than 100 acres would be eligible for such aid. Every parcel of land taken in the name of the plaintiff was less than 100 acres. **This indicates that the late father, through *deceit*, obtained advantage from the government, which would be against public policy.** (emphasis added) B

[40] I am of the view that, the said Deed and the letter of undertaking introduced by the defendants is an attempt by them to rectify the deceitful act of the deceased ie, to enjoy the benefit of financial aid from the government and at the same time retaining the right over the said lands (including the lands given to the plaintiff), to have them distributed equally between his children upon his death. C D

[41] Although the defendants claimed that it was their father's *deceit* and not theirs, it is crystal clear here that the defendants here are trying to get the assistance of this court to give effect to the wish of the deceased. E

[42] In *Norman Disney & Young v. Affifi Hj Hassan* [2011] 1 CLJ 210, Lee Swee Seng JC held that (at pp. 220 and 221):

> [31] The attitude of the court has been that anything that smacks or smells of illegality or any set of facts that seems to support such a suggestion will surely be seriously scrutinized by it. No court would knowingly be a party to the enforcement of an unlawful agreement. Support for this can be found in the case of *Thong Foo Ching & Ors v. Shigenori Ono* where Siti Norma Yaakob JCA [1998] 4 CLJ 674 (as she then was) held: F G
>
> As the arrangement between the parties is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is *void ab initio* and the parties were outside the pale of the law. The respondent, being a party thereto, cannot claim any remedy under this arrangement. Even if the respondent had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. The appellant, however, are entitled to rely upon illegality in their defence in order to meet the respondent's claim. The reason why the law allows the appellants to do so is due to the general principle of public policy contained in the *maxim ex do so malo non aritur action.* H I

[43] In *Kondapuram Raghuram v. Soo Peng & Ors* [2006] 5 CLJ 634, Ramly Ali J (as he then was) had occasion to address a similar issue in the context of an 'Ali Baba' arrangement *vis-a-vis* the application of s. 24(e) Contracts Act 1950 (at p. 647):

> What the petitioner seeks from this court in his petition is *inter alia*, for the court's sanction and the giving effect of his purported scheme elaborately designed to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government and the quasi-government bodies into the company an untrue 'bumiputra' status company, thus enabling the company opportunity to secure the special contracts. The petitioner's act is designed to circumvent the New Economic Policy where bumiputra participation in businesses is in line with. This tantamount to an improper act and certainly is one which is contrary to public policy. Section 24(e) of the Contracts Act 1950 states very clearly that 'the consideration or object of an agreement is lawful unless … (e) the court regards it as immoral or opposed to public policy'.

[44] Illustration (i) to s. 24(e) is very clear on this issue:

> 'A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

[45] The law is clear that every agreement of which the object or consideration is unlawful is void. Hence, the defendants' claim on the said deed and the letter of undertaking are unenforceable and this court should not be used to facilitate the defendants' claims any further.

[46] In the premise, I hold that the plaintiff is the duly registered proprietor or co-proprietor of the properties as stated in the 1st Schedule of the statement of claim and that the defendants have failed to establish a resulting trust in favour of the estate of the deceased to rebut the presumption of advancement in favour of the plaintiff.

[47] Be that as it may, for completeness, I will deal with the other two issues:

Whether The Said Deed Is Valid And Enforceable

[48] Assuming for a moment that illegality is not an issue here, is the said Deed valid and enforceable?

[49] It is a fact that the said deed was executed by the four children of the deceased (the plaintiff, the 2nd defendant and the original 3rd and 4th defendants). The grandchildren who are beneficiaries under the will are not privy to this said Deed.

[50] There is nothing in the said Deed to say that the original 3rd and 4th defendants had executed the said Deed in their own capacity as well as on behalf of their children. Neither was there any Power of Attorney (although pleaded), tendered as evidence that the grandchildren had authorised their respective fathers to execute the said Deed.

[51] I find that the said Deed is strictly an agreement between the four siblings to divide equally the properties as stated therein.

[52] The 3rd and 4th defendants in para. 10 of their defence pleaded:

> The Defendants will contend that every beneficiary under the will has consented to the re-arrangement as contained in the said Deed of Family Arrangement and the Letters of Undertaking. The 3rd and 4th Defendants have Powers of Attorney donated by their children (beneficiaries under the said will) to deal with their shares of the properties given under the will. There are subsequently reflected in the Deed of Family Arrangement and the Letters of Undertaking.

[53] It is clear from the above pleadings that the said Deed was executed to replace the Will of the deceased.

[54] Indeed the 1st defendant (SD4 herein) has admitted during cross-examination that he has managed the properties not in accordance to the Will but the said Deed (see p. 88 lines 19-21 of the notes of proceedings).

[55] The accounts tendered as evidence also show that the proceeds from the oil palm plantations were divided only among the four siblings and that the grandchildren did not receive any dividends from the 1st and 2nd defendants as executors and trustees of the estate of the deceased when the 3rd and 4th defendants were still alive.

[56] In the petition for probate (32-18-1994, High Court, Taiping), the 1st and 2nd defendants as executors and trustees of the Will had made a solemn oath to this court that they would administer the estate of the deceased as per the Will but instead administered and still administer the properties as per the said Deed.

[57] Can the 1st and 2nd defendants, who have had sworn on oath and represented to this court that they would duly administer the estate of the deceased and distribute the properties of the said deceased as per the Will, jettison the Will and administer the estate of the said deceased against the wish and intention of the testator by relying on the said Deed without leave or approval of the court?

[58] I seek guidance from the decision of Smith J in *In re Snelling, Snelling v. Hanna* [1930] NZLR 426, at 428 and 429, Supreme Court of Auckland:

> The executors have been granted probate of the will, and they have sworn to administer the trusts of that will. Before they assume the obligations imposed upon them by the Deed of family arrangement, they should be released from the duties imposed on them by the Will. My opinion is that, this course should be followed in all cases of this character. Accounts should be taken, and the Deed should specifically provide for the release of the executors from their obligations under the trusts of the will. The property could then be vested in certain persons as trustees under the Deed (whether the same persons as the executors or not) and they could hold it subject to the trusts set forth in the Deed. As the present Deed does not specifically release the executors in the manner which I have suggested, I am unable to approve of it as it now stands.

[59] Unlike the parties in *re Snelling*, the defendants in this action never sought the approval of the court for the said Deed.

[60] I also observe that the said Deed does not specifically release the executors and trustees from their obligations as trustees of the Will. In my judgment, the 1st and 2nd defendants ought to have obtained approval of the court for the said Deed.

[61] The 1st defendant and the grandchildren, who are beneficiaries under the Will, are not parties to the said Deed. The Power of Attorney purportedly authorising the 3rd and 4th defendants to act on their behalf in respect of the said Deed was never produced in court.

[62] The findings of this court from the evidence adduced in court are as follows:

i. The said Deed was not prepared by a solicitor, but by the 2nd defendant's husband who is also the father of the 1st defendant.

ii. The plaintiff did not have the benefit of independent legal advice when she was asked to sign the said Deed.

iii. The plaintiff and her family were still in mourning when the said Deed was executed.

iv. The said Deed was not signed in the presence of the witnesses, as alleged in the said Deed.

v. A list of the properties involved was never annexed to the said Deed and although the 1st defendant alleged that a list was given to the plaintiff, the purported list was never tendered in court. Neither was it put to the plaintiff when she testified in court. In any event, the 1st defendant was unsure whether the list was given before or after the execution of the said Deed.

[63] Therefore the status or validity of the said Deed is doubtful.

Duty Of Disclosure

[64] In *Pek Nam Kee v. Peh Lam Kong* [1996] 1 SLR 75 at 103C, Judith Prakash JC enunciated the following principles on the duty of disclosure; citing para 315 of Halsbury's.

> Duty of disclosure
>
> In any family arrangement there must be honest disclosure by each party to the other of all such material facts known to him, relative to the rights and title of either, as are calculated to influence the other's judgment in the adoption of the arrangement, and an advantage taken by either of the parties of the other's known ignorance of such facts will render the agreement liable to be set aside.
>
> If one party to the arrangement has material information in his possession which, without any dishonest intention, he does not communicate to the others, proceedings by them to set the transaction may succeed even though they made enquiries on the subject.

[65] There is no cogent evidence before this court that the 1st and 2nd defendants, who, at the material time, had possession of all the titles registered in the plaintiff's name, had disclosed to the plaintiff a full discovery of all properties that were registered in her name before she was asked to execute the said Deed.

[66] The 1st defendant, the executor and trustee of the Will of the deceased who managed the oil palm estates comprising the properties registered in the name of the deceased and the properties registered in the name of the plaintiff (and the 4th defendant) was unable to produce any cogent evidence to show that he had given the plaintiff a list of the properties registered in her name before she was asked to sign the said Deed.

[67] Secondly, the said Deed is silent as to the particulars of the properties registered in her name. No schedule or list of properties was annexed to the said Deed.

[68] A full disclosure of her properties was contained, for the first time, in the declaration of trust prepared by the 1st and 2nd defendants through their solicitors which the plaintiff and the 4th defendant refused to execute. The letter of undertaking also prepared by the 1st and 2nd defendants contains only 6 of the properties registered in the plaintiff's name.

[69] Against the totality of evidence and the sequence of events beginning with the Will, the said Deed, the letter of undertaking and the unexecuted declaration of trust, the last three of which were prepared at the behest of the 1st and 2nd defendants, it is my judgment that the plaintiff's arguments that there was material non-disclosure are well founded. On the issue of non-disclosure alone, I am prepared to set aside the said Deed on the ground that the plaintiff did not have the information which she needed, to come to a considered decision on the said Deed.

[70] The defendants' contention that the plaintiff ought to have known since she had managed the oil palm estates when her father was in India does not carry weight because there is no evidence to show that she had access to the titles which were registered in her name during that time. The titles were in the possession and custody of the 1st and 2nd defendants. Supervising the estate workers and keeping accounts does not necessarily imply that the plaintiff knew that the properties in Schedule 1 of the statement of claim were registered in her name.

Was There Undue Influence?

[71] The plaintiff claims that she signed the said Deed under influence.

[72] The plaintiff was the youngest amongst the four siblings, and the family were still mourning when the said Deed was executed.

[73] Before the said Deed was signed, the 1st and the 2nd defendants did not advise the plaintiff that she could seek independent legal advice on the proposal. No list of properties or accounts was presented.

[74] The 1st and 2nd defendants, as executors and trustees of the estate of the deceased, were in a fiduciary relationship *vis-a-vis* the beneficiaries, including the plaintiff.

[75] The plaintiff was entitled under the will to 25% of the estate of the deceased but was not paid her share since November 1997 until she got it in court in 1995 – see evidence of the 1st defendant (SP4) at p. 80 of the notes of proceedings.

[76] The defendants contend that all the plaintiff's 11 properties are to be divided equally amongst the four siblings.

[77] Thus the said Deed was manifestly disadvantageous to the plaintiff in that 3/4 share of all her 11 properties was to be given away to her siblings, the 2nd, 3rd and 4th defendants.

[78] In my judgment, the 1st and 2nd defendants as the executors and trustees, and both the late 3rd and 4th defendants as her elder brothers did exercise their influence on the plaintiff to sign the said Deed. The said Deed constituted an advantage taken of the plaintiff subject to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it – see *National Westminster Bank v. Morgan* [1985] AC 686 at p. 704 which was cited in *Pek Nam Kee*'s case *(supra)* at p. 105.

[79] In my opinion, the said Deed constituted a wrongful advantage taken by the defendants over the plaintiff. There is sufficient evidence for me to hold that I should presume that undue influence was exercised by the defendants.

[80] The burden of rebutting the presumption lies on the defendants, and in my judgment, the defendants have failed to discharge this burden.

[81] Undue influence is explained in s. 16 of the Contracts Act 1950:

> 16 Undue influence
>
> (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another:
>
> (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) (a) Where a person who is in a position to dominate the will of another, enters into a contracts with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

[82] The principles laid down by our Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 at p. 656 are on point:

> It is, I think, clear that a claim for relief from a transaction on the ground that it was procured by or entered into under the 'undue influence' of the party charged, includes, as a matter of law, both undue influence in the sense of domination of one over another, and also abuse of the duties of care and confidence which may be imposed on one party towards another as a result of the particular relationship which emerges from the special circumstances of their association.

And at p. 651, Gopal Sri Ram JCA (as he then was) quotes Mr. Justice Wright in *Morley v. Loughnan* [1893] 1 Ch. 736:

> That law is, that where large voluntary gifts are made and accepted *inter vivos*, the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing.

And at p. 659, the learned judge then cites Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Inc v. Kuys* [1973] 2 NZLR 163:

> The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (*Boardman v. Phipps* [1967] 2 AC 46; [1966] 3 All ER 721). It retains its vigour in all jurisdictions where the principles of equity are applied.
>
> The proof of dominance of the will of a party to a transaction-be it a gift, a sale or purchase or a charge upon property by the other party to the transaction is not a *sine qua non* of the doctrine of undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed.

Whether The Letter of Undertaking Are Valid And Enforceable

[83] The letter of undertaking does not talk about any trust. It says:

> I agree and undertake that I shall transfer for love and affection …

[84] The said letter of undertaking was prepared by solicitors for the 1st and 2nd defendants but was not signed before any solicitors. The plaintiff did not have the benefit of independent legal advice.

[85] It refers only to a portion of the titles in the name of the plaintiff.

[86] There was no consideration given to the plaintiff for the said document.

[87] If it is meant to be a gift, it is an imperfect gift. If the letter of undertaking is a voluntary gift, in order to render the letter valid and enforceable, the plaintiff must have done everything, which was necessary to be done, in order to transfer the properties and render the gift binding upon her.

[88] In the case before me, the plaintiff did not execute any transfer form to effect the transfer. In my judgment, the plaintiff has not done everything that was necessary to effect the transfer. Therefore, if at all it is a gift, it is an imperfect gift.

[89] In *Hj Mohamed Idris v. Grenier* [1939] 1 LNS 31, Terrell, AG CJ endorsed the principles laid down by Viscount Haldane in the Privy Council case of *Macedo v. Beatrice Stroud* [1922] 2 AC 330:

> It (the transfer), therefore having regard to the terms of the Ordinance, transferred no estate or interest either at law or in equity. At the most it amounted to, an incomplete instrument which was not binding for want of consideration. (at page 303).

[90] And to borrow the words of Taylor J in the Court of Appeal case of In *Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow & Ors* [1951] 1 LNS 77:

> This disputed instrument, was an unilateral undertaking to renounce by way of gift; it was not signed by the donees, it was not a mutual agreement between signatories; it was not an effective assignment binding the administrator; it was not an agreement between the signatories and the donees either by way of compromise of doubtful rights or for natural love and affection between them.

[91] On the issue of acquiescence, one cannot affirm a transaction unless one knows the full facts surrounding that transaction. The responsibility of ensuring that the plaintiff knew about the properties registered in her name and understood the terms and effect of the said Deed lay with the 1st and 2nd defendants as executors and trustees of the estate of the deceased.

[92] It is my finding that the plaintiff did not have knowledge of the fact that the 11 properties in the 1st Schedule of the statement of claim were registered in her name when she executed the said Deed. The Letter of Undertaking and the unexecuted declaration of Trust were prepared by the 1st and 2nd defendants to bolster the family arrangement. So I am not persuaded by the defendants' arguments on acquiescence.

Conclusion

[93] For the aforesaid reasons, I allowed the plaintiff's claim as per prayer 1 to 7. Item 8 and 9, to be assessed by the Deputy Registrar.

[94] I award interest at the rate of 8% per annum on prayer 8 and 9 from 11 March 2011 until full realization.

[95] Defendants' counter claim is dismissed.

[96] Cost RM80,000 (agreed upon) to the plaintiff for the claim and the counter claim.